Decision 04-01-032 January 8, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Examine the Commission's Future Energy Policies, Administration and Programs.	Rulemaking 01-08-028 (Filed August 23, 2001)

ORDER DENYING APPLICATIONS FOR REHEARING OF DECISION 03-07-034 AND DENYING REQUEST FOR ORAL ARGUMENT AND MOTION FOR STAY

I. SUMMARY

Residential Energy Service Companies United Effort (RESCUE) has applied for rehearing of Decision (D.) 03-07-034. Women's Energy Matters (WEM) has also applied for rehearing of D.03-07-034, as well as requesting oral argument and filing a motion to stay the decision. For the reasons set forth below, by this order we deny RESCUE's application for rehearing and we also deny the application for rehearing, request for oral argument and motion for stay filed by WEM, because these parties have failed to demonstrate that the decision is erroneous.

II. BACKGROUND

D.03-07-034 is an interim opinion in Order Instituting Rulemaking to Examine the Commission's Future Energy Efficiency Policies, Administration and Programs, Commission proceeding number (R.) 01-08-028, concerning implementation of provisions of Assembly Bill (AB) 117 relating to energy efficiency (EE) program fund disbursements. AB 117 is codified in Public Utilities Code sections 331.1, 366.2 and 381.1.[1] AB117 establishes Community

[1] Hereinafter, all statutory references are to the Public Utilities Code unless otherwise indicated.

Choice Aggregators (CCAs), authorizing any city, county or combination thereof, to aggregate the electrical loads of local customers.[2]

AB 117 requires the Commission to establish certain policies and procedures regarding EE program funding no later than July 15, 2003. For purposes of the interim phase of this proceeding, we interpreted the provisions of AB 117 narrowly and "adopt[ed] [skeletal] rules … that do not presume any particular outcome in the broader inquiry." (D.03-07-034 at 4.) Accordingly, we limited D.03-07-034 to issues regarding EE program funding. In doing so, we notified the parties that we intended to conduct a broader inquiry in this proceeding in order to develop rules by which cities and counties may aggregate local load and purchase power as CCAs pursuant to the requirements of AB 117. Further, we stated that we may modify those rules in the future "to make them consistent with the policy direction and rules the Commission ultimately adopts on the broader issues." (*Id*.)

For purposes of this interim phase, we have used the terms "administrator" and "implementer," interchangeably. We believe that our existing policies and procedures for selecting EE programs and administrators as set forth in our EE policy manual, generally fulfill those portions of AB 117 that require us to permit non-utilities to apply for program funding and that articulate policy criteria for selecting programs to be funded with revenues collected pursuant to section 381.

[2] CCAs are defined in section 331.1.

III. DISCUSSION

A. RESCUE and WEM have failed to establish that D.03-07-034 is erroneous.

1. Neither RESCUE nor WEM have established that D.03-07-034 fails to comply with the relevant legislation.

WEM, in its application for rehearing, incorporates by reference RESCUE's application for rehearing. (WEM application for rehearing at 1.) RESCUE takes issue with the decision's Finding of Fact No. 2 that existing Commission policies for selecting energy efficiency programs and administrators fulfill the requirements of AB 117. It contends that investor-owned utilities (IOUs) receive overwhelming preference, via those policies and procedures, in receiving awards for the administration and implementation of Public Goods Charge (PGC) funded EE programs. Further, RESCUE argues that, to date, non-IOUs or other third-party applicants have been inherently restricted to the status of second-class providers under the procedures of our EE manual (dated October 1, 2001). Finding of Fact No. 2 provides:

> The Commission's existing policies and procedures for selecting energy efficiency programs and administrators (or "implementers" as defined by the Commission's energy efficiency policy manual) generally fulfill those portions of AB 117 that require the Commission to permit non-utilities to apply for program funding and that articulate policy criteria for selecting programs to be funded with revenues collected pursuant to [s]ection 381. (D.03-07-034 at 19.)

RESCUE argues that, to date, under those procedures there have been two opportunities for "third parties" to submit proposals: 1) Year 1 solicitation, i.e., funding in January 2002 for programs to be implemented during the two year period of 2002-2003; and 2) Year 2 solicitation, i.e., scheduled for October 2003 for programs to be implemented during the 2-year period of 2003-

2004. RESCUE complains that in both instances, funding restrictions applied to third parties ultimately resulted in less funding allocations for such parties. RESCUE contends that the vast majority of all statewide programs were reserved exclusively for the utilities. Further, RESCUE claims that there was no solicitation of third parties for local programs at all. The ultimate consequence, argues RESCUE, is that during the two years the EE Manual has been adopted, third parties have been allowed to bid for only about 20% of the EE funds and that the majority of all funds were specifically set-aside and reserved for IOU-sponsored and IOU-implemented statewide and local programs.

RESCUE contends AB 117 permits all parties to place competitive applications for all available funds. In support, RESCUE points to AB 117's expression of a preference for allowing competitive opportunities for potentially new administrators. Further, RESCUE notes that one's status as a utility is not part of the criteria set forth in the legislation to be given weight in the Commission's selection process, and that the legislation reflects a strong preference for increasing competition in the provision of EE administration services by requiring the Commission to consider "the value of allowing competitive opportunities for potentially new administrators." It argues that the intent of AB 117 establishes a strong legislative preference for allowing competitive opportunities for potentially new administrators. (RESCUE application for rehearing at 3.) According to RESCUE, our interpretation of AB 117 is not defensible because it permits the alleged limitations in funding.

RESCUE relies on *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852, and *In re J.W.* (2002) 29 Cal.4th 200, 209, in support of its statutory interpretation argument.

The case of *In re J.W*, *supra*, 29 Cal.4th at 209, concerned the interpretation of a provision of the Family Code. The court stated:

> Our role in construing astatute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citations.] We consider first the words of the

> statute because they are generally the most reliable indicator of legislative intent. [Citation.]

In *Gikas v. Zolin, supra*, 6 Cal.4th at 852, the court, reviewing an applicable statute concerning Department of Motor Vehicle administrative proceedings following dismissal of a criminal action arising from the same facts (where such proceedings are precluded by the applicable statute), noted the maxim: "The expression of some things in a statute necessarily means the exclusion of other things not expressed." Thus, in that case, because the pertinent statute mandated that the acquittal of criminal charges does preclude the administrative charge arising out of the same facts, the court determined: "The expression of preclusion by an acquittal excludes preclusion in other regards not expressed" (*Id.*) Neither of the cases relied on by RESCUE, nor the legal maxim referenced above, are pertinent here: there is no preclusive language used in the relevant enactments.

RESCUE argues that status as a utility is not a specific criteria for approval as an administrator established by section 381.1, in support of its theory that the legislation states a strong preference for new (i.e., non-IOU) administrators. Section 381.1 provides in pertinent part:

> (a) No later than July 15, 2003, the commission shall establish policies and procedures by which any party, including, but not limited to, a local entity that establishes a community choice aggregation program, may apply to become administrators for cost-effective energy efficiency and conservation programs established pursuant to Section 381. In determining whether to approve an application to become administrators, the commission shall consider the value of program continuity and planning certainty and the value of allowing competitive opportunities for potentially new administrators. The commission shall weigh the benefits of the party' s proposed program to ensure that the program meets the following objectives:

> (1) Is consistent with the goals of the existing programs
>
> established pursuant to Section 381.
>
> (2) Advances the public interest in maximizing cost-effective electricity savings and related benefits.
>
> (3) Accommodates the need for broader statewide or regional programs.

There is no language precluding utilities as administrators. RESCUE's arguments do not demonstrate that we are not complying with the relevant law. RESCUE has failed to establish that we have misinterpreted and/or failed to comply with the requirements of AB 117.

WEM makes similar claims, arguing that CCAs are customers and that as such they should be distinguished from parties that are suppliers in evaluating their eligibility to administer EE funds. In D.03-07-034 we stated:

> AB 117 generally preserves the Commission's discretion to determine the procedures and criteria under which it will consider applications for energy efficiency program funding. While the statute requires the Commission to develop procedures for all interested parties, it does not distinguish types of parties or state that the Commission must treat all types of parties the same (Section 381.1(a)). Nevertheless, we are not prepared to treat CCAs any differently from other parties at this time. While we may ultimately find that CCAs are appropriately independent agencies that should have considerable deference to use Section 381 funds, we leave the issue of CCA's role and discretion to our broader rulemaking. To treat them differently at this time would presume a policy direction that we are not prepared to address in the narrow context of this inquiry. We may reconsider the process and criteria for reviewing CCA applications for energy efficiency program funding. Until and unless we do, we will apply the same procedures and criteria for review that we apply now to all Third Party applicants for energy efficiency program funding, including EM&V

> requirements. CCAs shall refer to Commission orders and its energy efficiency policy manual in making requests for Section 381 funding. (D.03-07-034 at 10.)

WEM disagrees with our policy but it fails to demonstrate that section 381.1(a) requires the Commission to draw any distinction between any of the parties, including CCAs, and thus fails to demonstrate that we have violated the provisions of the statute. WEM has not established legal error on this issue.

2. Neither RESCUE nor WEM have established that D.03-07-034 fails to comply with the schedule requirements of AB 117.

Next RESCUE argues that D.03-07-034 errs in not establishing a schedule for complying with AB 117. RESCUE points to the July 15, 2003 date set forth in section 381.1(a) and contends that it is a deadline we have failed to meet, arguing that we have no process for parties other than utilities to apply to become administrators. In addition, it contends that our process for allowing non-utilities to become implementers has restricted non-utilities to a small and diminishing share of PGC EE funds, in violation of AB 117 for the reasons addressed above.

WEM makes a similar claim, contending that July 15, 2003 was a statutory deadline for the Commission to issue new rules. WEM does not provide what rules it has in mind, thus rendering its allegation vague.

In D.03-07-034 we identified the issues we must resolve to implement the EE provisions of AB 117. One of those is:

> What does the Commission need to do to create a process for parties to apply to become administrators for cost-effective energy efficiency programs, as AB 117 requires? (D.03-07-034 at 4.)

We answer that question at page 7 of the decision, referencing section 381.1(a), stating:

> AB 117 requires the Commission to implement certain of its provisions by July 15, 2003. Those provisions concern the ability of CCAs and other parties to be

> able to apply to be administrators of energy efficiency programs… (*Id*., at 7.)

Moreover, the interim decision continues:

> Significantly, by directing the Commission to establish procedures for non-utilities to apply for energy efficiency program funding, AB 117 encodes the Commission's current policy to permit third parties to apply for energy efficiency program funding rather than allocating all energy efficiency program funding and responsibilities to the Commission's jurisdictional utilities.
>
> In summary, the Commission is already implementing that portion of AB 117 that requires a process for parties to apply for energy efficiency program funding authorized in Section 381. It selects programs using criteria that are consistent with AB 117 and expressed in Section 381.1(a). To the extent the Commission changes its energy efficiency programs and policies, it will consider the requirements of AB 117. (*Id*., at 8-9.)

According to RESCUE, as of July 15, 2003, we were required by AB 117 to begin accepting applications by any party for administration of EE programs. However, as referenced above, the statutory language upon which RESCUE relies in support of its argument concerns the establishment of policies and procedures for the application process, and does not require that the Commission begin accepting such applications by that date. RESCUE has not contended that we failed to establish policies and procedures for the application process. Its allegation on this point is without merit.

3. Neither RESCUE nor WEM have established that the Commission has erred in its interpretation of "administrator" for purposes of the interim decision.

RESCUE also alleges that we have improperly intertwined the roles of administrator and implementer. AB 117 does not define "administrator." In D.03-07-034, we stated:

> We interpret "administrator" in this context to mean any entity implementing an energy efficiency program which is the subject of Section 381, which authorizes the expenditure of certain funds on energy efficiency programs. This contrasts with the Commission's energy efficiency policy manual, which distinguishes "administrators" from "implementers." (*Id*., at 7, fn 2.)

RESCUE claims that under the Commission's interpretation "implementer CCAs and other implementers could (and likely would) remain subservient to the utility 'administrators.'" (RESCUE application for rehearing at 5, emphasis added.) RESCUE does not support its argument with any facts and its allegation is based entirely on speculation. RESCUE contends possible conflicts of interest may arise but its allegation is a policy argument, not a legal one. Public Utilities Code section 1732 provides:

> The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application. (Emphasis added.)

Commission Rules of Practice and Procedure, rule 86.1[3] provides:

> Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission.

RESCUE is cautioned not to use the rehearing process to reargue its policy positions. Further, RESCUE mistakenly views the Commission's

[3] Hereinafter, all references to the Commission's Rules of Practice and Procedure shall be to "rule" or "rules," unless otherwise indicated

interpretation as relegating a non-utility administrator to the role of implementer only. That is not what the above-referenced language says; rather, D.03-07-034 defines an administrator as an entity that implements an EE program. (*Id*.)

RESCUE contends that our EE manual defines "administrator" in a manner that does not limit the designation to the utilities and that we are required to interpret the term "administrator" for purposes of AB 117, in the identical manner that we have for the past several years in our EE policy manual. It argues that since we have been using the terms "administrator" and "implementer" in our orders on EE programs prior to the enactment of AB 117, the Legislature relied on our interpretation of those definitions set forth in our EE policy manual in enacting AB 117. Consequently, RESCUE argues, the interpretation set forth in the decision is erroneous under California case law. RESCUE cites no legislative history in support of its argument. The legislative history of AB 117 is silent on the issue of the definition of "administrator." The definition of "administrator" set forth in the EE policy manual is based upon the Commission's discretion as is the definition set forth in D.03-07-034.

RESCUE relies on *Robinson v. Fair Employment & Housing Commission* (1992) 2 Cal.4th 226; *City of Los Angeles v. Public Utilities Com.* (1975) 15 Cal.3d 680, 696; and *Wotton v. Bush* (1953) 41 Cal.2d 460, 466, in support of its argument that the rules of statutory interpretation require us to presume that the Legislature is fully aware of our contemporaneous use of specific terms and therefore the same usage must be applied to the same terms used in any new legislation. However, the cases relied on by RESCUE concern instead the principle that courts will generally defer to an agency's long-time consistent interpretation of a statute. That is not the issue here.

AB 117 is a recently adopted statute and D.03-07-034's interpretation of "administrator" for purposes of that legislation is contemporaneous with the law, i.e., there has been no past interpretation of AB 117's use of "administrator." It does not necessarily follow under the rule set

forth in *Robinson, supra*, and the other cases relied upon by RESCUE, that the Legislature in enacting AB 117 intended that the Commission use the exact same interpretation for "administrator" it used in the EE policy manual.

The legislative history of AB 117 is silent on the issue of the definition of "administrator." The definition of "administrator" set forth in D.03-07-034 is within our discretion. RESCUE has not established that D.03-07-034 has erred on this issue. The allegation is, therefore, without merit.

Like RESCUE, WEM argues that the term "administration" is different from "implementation," and that the Commission has erred in its interpretation. WEM's argument is chiefly based on speculation and policy disagreements, rather than demonstration of error. It is without merit.

4. The argument concerning Appendix C data and the remaining arguments set forth in RESCUE's and WEM's applications for rehearing are policy issues and not a proper allegations of error for purposes of the rehearing process, and in any event are without merit.

The final argument raised by RESCUE again does not comply with section 1732 and the Commission's rules for applications for rehearing. It appears that RESCUE is contending that there is a discrepancy between the dicta of D.03-07-034 at page 17, providing: "The types of information listed in Attachment C should be provided to any party within one week of the request," and Attachment C's reference to "cities, counties or CCAs," rather than "any party." The Appendix C data arises in Section F of the decision, under the query:

> What kinds of information should the utilities provide to CCAs? Should that information be available to all parties who request it? (D.03-07-034 at 16.)

Appendix C answers the first of those two questions by detailing the types of information the utilities should provide to CCAs and others. The second

question is answered in the text at page 17 which directs the electric utilities (specifically, SEMPRA, SCE and PG&E) to:

> …provide the information listed on Attachment C. Where that information may be confidential, the utility should mask the information or require the city, county, or CCA representative to sign a nondisclosure agreement.

The utilities are required to provide this information to CCAs and others requesting it within one week of a request. RESCUE's allegation that the decision is inconsistent on this point is without merit.

RESCUE also includes in its application for rehearing various modifications it desires we make to D.03-07-034 that would alter the outcome of the decision; however, the application for rehearing is not a petition for modification but rather a vehicle for apprising the Commission of alleged legal error. RESCUE has failed to demonstrate that any of the modifications sought by it are legally required.

For all of the reasons set forth above, RESCUE's arguments are without merit and thus, WEM's application for rehearing is, to the extent it raised the same issues as RESCUE, also without merit. WEM raises additional issues in its application for rehearing, however, these raise policy concerns rather than specific allegations of legal error as required by statute and Commission rules. (§ 1732; rule 86.1.) WEM is cautioned that the application for rehearing process is not an extra opportunity to submit additional comments on the decision. WEM abused the rehearing process recently in its application for rehearing of D.03-04-055 wherein we notified WEM of the requirements of section 1732, declaring: "[WEM] has not complied with or set forth a convincing showing under … [s]ection 1732." (D.03-06-077 at 3.) WEM is reminded that, in appearing before the Commission, it is required, among other things, to comply with the laws of this state. (Rule 1.) WEM was provided with an opportunity to file comments and reply comments prior to the issuance of D.03-07-034 and took advantage of that procedure, filing its comments on June 30, 2003 and reply comments on July 8,

2003. WEM has used the rehearing process to improperly reargue the points it made in comments. WEM is advised to carefully review the laws and rules concerning applications for rehearing and hence forth, to abide by them. Aside from incorporating RESCUE's application for rehearing by reference, WEM has not presented legal authority or cited to the record in support of its arguments. (§ 1732.) It has failed to demonstrate legal error in the decision and its application is without merit.

B. WEM Has Failed To Show How Oral Argument Will Materially Assist The Commission In Resolving Its Application For Rehearing.

WEM requests oral argument as a means of materially assisting the Commission in resolving its application for rehearing. Rule 86.4 provides in pertinent part: "The request for oral argument should explain why the issues raised in the application meet the criteria stated in Rule 86.3…." Rule 86.3 provides:

> An application for rehearing will be considered for oral argument if the application …
>
> (1) demonstrates that oral argument will materially assist the Commission in resolving the application, and (2) the application or response raises issues of major significance for the Commission because the challenged order or decision:
>
> (i) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;
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> (ii) changes or refines existing Commission precedent;
>
> (iii) presents legal issues of exceptional controversy, complexity, or public importance; and/or
>
> (iv) raises questions of first impression that are likely to have significant precedential impact.
>
> (b) These criteria are not exclusive and are intended to assist the Commission in choosing which applications for rehearing are suitable for oral argument. The

> Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. Arguments must be based only on the evidence of record. Oral argument is not deemed part of the evidentiary record. The evidentiary record will stand as it did at the time of the Commission's decision.
>
> (c) For purposes of this rule, "existing Commission precedent" is a prior Commission decision that the Commission expects to follow.

WEM has not explained why its allegations meet the criteria set forth in rule 86.3, as required by rule 86.4. It has not demonstrated a need for oral argument. Although WEM alleges that D.03-07-034 contradicts the requirements of AB 117 with respect to the allocation of PGC funds for EE programs, it has failed to establish this and for the reasons set forth above, we find that its allegations and request for oral argument are without merit.

C. WEM's Motion For Stay Is Denied

WEM requests that we stay the proceeding until pending our grant of its application for rehearing. WEM presents policy arguments in support of its request, which is premised on its theory that the decision adversely impacts CCAs. However, WEM has not established this and, for the reasons set forth above, the application for rehearing is denied.

Whether to grant a motion for stay is a matter within our discretion. (§ 1735.) In determining whether to grant or deny a motion for stay, the Commission has employed various criteria, including: 1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; and 2) whether the moving party is likely to prevail on the merits. WEM has not discussed criteria for granting its motion and has not provided any indication of what, if any, actual serious or irreparable harm it will suffer if its motion is not granted. Accordingly, WEM has not established good cause for the granting of its motion, and the motion to stay D.03-07-034 is denied.

IV. CONCLUSION

We have reviewed each and every allegation raised by RESCUE and WEM in their applications for rehearing and are of the opinion that good cause does not exist to grant rehearing because RESCUE and WEM have failed to demonstrate that D.03-07-034 is legally erroneous. WEM has not demonstrated a need for oral argument or for staying the decision.

Therefore, **IT IS ORDERED** that:

1. The application for rehearing of Decision 03-07-034 filed by Residential Energy Service Companies United Effort is hereby denied.
2. The application for rehearing, request for oral argument and the motion for stay of Decision 03-07-034 filed by Women's Energy Matters are hereby denied.
3. This proceeding is closed.

This order is effective today.

Dated January 8, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I will file a concurrence.

/s/ SUSAN P. KENNEDY
Commissioner

I reserve the right to file a dissent.

/s/ LORETTA M. LYNCH
Commissioner

V. **CONCURRING OPINION** of Commissioner Susan P. Kennedy:

I support the disposition of the Applications for Rehearing of Decision (D.) 03-07-037 filed by Women's Energy Matters and Residential Energy Service Companies' United Effort. In general, these parties contend that Assembly Bill 117 permitted all parties to place competitive applications for all available Public Goods Charge funds. Nothing in Assembly Bill 117 permits this, nor have these parties adequately demonstrated that the Commission is not complying with the relevant law. I agree with the analysis conducted by the Commission's legal staff that recommended dismissal of these Applications for Rehearing on the basis that these challenges are nothing more than a collection of policy positions rather than specific allegations of legal error. I agree that the Applications for Rehearing of D.03-07-037 have failed to establish legal error and that the Applications are therefore without merit.

Dated January 8, 2004, San Francisco, California

SUSAN P. KENNEDY
Commissioner

San Francisco, California
January 8, 2004